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# Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor

John Henry Schlegel

Few people other than Robert Stevens<sup>1</sup> and Jerold Auerbach<sup>2</sup> seem to have spent much time thinking about the generation and a half of law teachers between the founders of modern legal education—Langdell, Ames, Thayer, and Gray at Harvard—and the reconstructors of legal education—the Realists at Columbia, Yale, and Johns Hopkins. True, everyone has heard of Wigmore<sup>3</sup> and Williston,<sup>4</sup> some perhaps of Joseph Beale,<sup>5</sup> maybe William

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1. See Robert Stevens, *Law School: Legal Education in America from the 1850's to the 1980's* (Chapel Hill, 1983) [hereinafter cited as Stevens, *Law School*]; Robert Stevens, *Two Cheers for 1870: The American Law School*, 5 *Persp. Am. Hist.* 405 (1971) [hereinafter cited as Stevens, *Two Cheers*].
2. See Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York, 1976).
3. (1863-1943). A.B. 1883, LL.B. 1887, Harvard. Private practice, 1887, Boston. Prof. 1889, Keio University, Tokyo, Japan. Prof. 1893, dean 1901, Northwestern University. His most famous work is John Wigmore, *A Treatise on the Law of Evidence* (Boston, 1904-1905). See generally William Roalfe, *John Henry Wigmore: Teacher, Scholar, Reformer* (Evanston, 1977).
4. (1861-1943). A.B. 1882, A.M. 1888, LL.B. 1888, Harvard. Private practice, 1889, Boston. Asst. Prof. 1890, Prof. 1895, Harvard. Williston drafted the Uniform Sales Act (1906), and was later the chief reporter of the American Law Institute's Restatement of Contracts. His most famous works are Samuel Williston, *The Law of Contracts* (Boston, 1920-1922), and Samuel Williston, *The Law Governing Sales of Goods at Common Law and under the Uniform Sales Act* (New York, 1909).
5. (1861-1943). A.B. 1882, A.M. 1887, LL.B. 1887, Harvard. Private practice, 1887, Boston. Lecturer 1890, Inst. 1891, Asst. Prof. 1892, Prof. 1897, Harvard. His most famous work is Joseph Beale, *A Treatise on the Conflict of Laws* (New York, 1935).

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Keener,<sup>6</sup> conceivably Austin Wakeman Scott<sup>7</sup> and Wesley N. Hohfeld,<sup>8</sup> but who other than a compulsive reader of old law reviews would know about the likes of Ernest W. Huffcutt,<sup>9</sup> Harry Richards,<sup>10</sup> William Reynolds Vance,<sup>11</sup> or Eugene Wambaugh.<sup>12</sup> There is no good reason why anyone should have heard of these men. They are a rather standard-issue group of humans with the usual percentage of fools and knaves, wise and dumb, exceptionable only for a surplus of what might be called "hot dogs." This slight surplus in the direction of a characteristic eagerness for their work, however, defines these law professors in a useful way.

When Stevens looked at this in-between generation, he noted what he called the triumph of the Harvard Structure—the spread of the full-time, three-year, day, university law school enrolling mostly college graduates and teaching a largely prescribed, generally identical curriculum of private law subjects.<sup>13</sup> He ascribed this triumph of rising standards to the nativism of an upper middle class that sought to limit the access to the legal profession of the poor generally and the immigrant poor in particular. Auerbach agreed, though in somewhat stronger words.<sup>14</sup> Quite obviously both men are correct in their assessment. Stevens also commented on what he called the triumph of the Harvard Approach—casebooks, large classes, Socratic dialogue, and single written examinations—but he had a harder time giving any reason,

6. (1856-1913). A.B. 1874, Emory College; LL.B. 1887, Harvard. Private practice, 1878, New York City. Asst. Prof. 1883, Prof. 1888, Harvard; Prof. 1890, Dean 1891, Prof. 1901, Columbia. Judge, New York Supreme Court 1902. Private practice, 1903, New York City. His most famous work is William Keener, *A Treatise on the Law of Quasi-Contracts* (New York, 1893).

7. (1884-1981). A.B. 1903, Rutgers; LL.B. 1909, Harvard. Inst. (mathematics) 1903, Rutgers; Inst. (law) 1910, Asst. Prof. 1910, Prof. 1914, Harvard. His most famous work is Austin Scott, *The Law of Trusts* (Boston, 1939).

8. (1879-1918). B.A. 1901, U. Cal.; LL.B. 1904, Harvard. Lecturer 1905, Hastings; Inst. 1905, Asst. Prof. 1907, Assoc. Prof. 1908, Prof. 1909, Stanford; Prof. 1914, Yale. Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913), is his most famous work.

9. (1860-1907). B.S. 1884, LL.B. 1887, Cornell. Private practice, Minnesota, 1888. Prof. 1890, Indiana; Prof. 1892, Northwestern; Prof. 1893, Dean 1905, Cornell. Chairman, ABA Section on Legal Education, 1901; Sec.-Treas., 1901-1903, Pres. 1903, AALS. Ernest Huffcutt, *A Treatise on the Law of Agency* (Cambridge, 1895), is his only famous work.

10. (1868-1929). Ph.D. 1892, Iowa; LL.B. 1895, Harvard. Private practice, Missouri, Iowa, 1895. Prof. 1899, Iowa; Dean 1903, Wisconsin. Pres. 1912, AALS. Harry Richards, *Cases on Private Corporations* (St. Paul, Minn., 1912), is his only significant scholarship.

11. (1870-1940). A.B. 1892, A.M. 1893, Ph.D. 1895, LL.B. 1897, Washington and Lee. Asst. Prof. 1897, Prof. 1898, Dean 1900, Washington and Lee; Prof. 1903, Dean 1905, George Washington; Prof. 1910, Yale; Dean 1912, Minnesota; Prof. 1920, Yale. Pres. 1914, AALS. William Vance, *A Treatise on the Law of Insurance* (St. Paul, Minn., 1904), and William Vance, *Cases and Other Materials on the Law of Insurance* (St. Paul, Minn., 1914), are his major publications.

12. (1856-1940). A.B. 1876, A.M. 1877, LL.B. 1880, Harvard. Private practice, Cincinnati 1880. Prof. 1889, Iowa; Prof. 1892, Harvard. Eugene Wambaugh, *The Study of Cases* (Boston, 1894), is his most famous work.

13. Stevens, Law School, *supra* note 1, at xv.

14. Auerbach, *supra* note 2, at 106-09.

other than a financial one, why this package of nostrums was easily sold.<sup>15</sup> He suggested vaguely that the importance of the development of large corporate practice, the “intellectual value” of the case method and the magic of science in the late nineteenth-century world together eased the sale. Auerbach, on the other hand, saw a tension between the law professors and the organized bar, which he ascribed to a professorial interest in “law reform.”<sup>16</sup>

While neither man was seeing ghosts, the observations of each raise problems. The triumph of the case method may well have been more verbal—a triumph of casebooks—than real;<sup>17</sup> and any careful look at law professors as reformers finds them substantially to the right of even the now much maligned progressives.<sup>18</sup> But, these criticisms aside,<sup>19</sup> there are similarities in the questions these men sought to answer and in their failure to deal with them adequately.

Both scholars attempted to explain how and why law schools—particularly university connected law schools, staffed not with practitioners but with full-time academics—sprang up like mushrooms after a rain during the years around 1890. They answered these related questions by looking largely within the “law box.”<sup>20</sup> In doing so they came up with one solid observation—that it was in the class-based interest of legal professionals to raise standards—plus a few other observations that did not quite fit. Had they looked outside the law box they might have noticed something curious. Though the key date would have to be shifted, the questions they asked could have been posed about a half a dozen modern disciplines—anthropology, economics, history, political science, psychology, and sociology—the social sciences as we know them. Now, as Dorothy Ross has shown, histories of these other disciplines disclose a largely coherent pattern to the “how” and begin to suggest, a reasonable

15. Stevens, *Two Cheers*, *supra* note 1, at 63-64.

16. Auerbach, *supra* note 2, at 76-85.

17. It is extremely difficult to obtain accurate information about the teaching of one's colleagues. It is disproportionally more difficult to obtain accurate information about teaching seventy-five years ago. Nevertheless scraps and pieces suggest that beyond establishing a norm of some *in class* dialogue, reports of the rigor of case-method teaching before World War I are, like reports of Mark Twain's death, an exaggeration. Ignoring Harvard, for which no thoroughly reliable, comprehensive history exists for the years after 1908, the frequency of comments in law school histories that a faculty member did not pursue the Socratic method “in all its rigor” and the much lower frequency of comments that a faculty member was a “master” of it or a “terror” in the classroom should make one pause before suggesting that the use of casebooks brought an end to lecturing.

18. See e.g., William Vance, *The Ultimate Function of the Law Professor*, 3 *Am. L. Sch. Rev.* 2 (1911) one of Auerbach's more important examples of law professors and reform, Gerald Feiner, *The Law Teacher as Legal Reformer: 1900-1945*, 20 *J. Legal Educ.* 508 (1977), is largely concerned with activities after World War I.

19. These criticisms should not obscure the fact that without the work of Stevens and Auerbach, saying anything about late nineteenth and early twentieth century law professors would be impossible.

20. Robert Gordon, *J. Willard Hurst and the Common Law Tradition in American Historiography*, 10 *Law & Soc'y Rev.* 9, 10 (1975).

plausible "why."<sup>21</sup> In each field a small group of scholars created an academic discipline where none had been before. Each group began by staking out part of the intellectual world as its "turf," adopting a particular way of looking at that turf, a method as it were, and moving to cut out the "amateurs" who formerly had a claim to that turf. Finally they justified those activities by pointing to the "mission" of the discipline. Such is the process of academic professionalization, a common objective for the middle class of the late nineteenth and early twentieth century. This "how" and "why" fits for law schools too and so explains Stevens's and Auerbach's observations. It also illuminates such intriguing questions as whether anyone ever took Langdell seriously when he suggested that law was a science and as a science it was best studied by studying appellate cases, a proposition that for twenty years was treated as daft by most everyone outside of Austin Hall.

The rough outlines of the Langdellian conquest, really creation, of the modern law school are well known.<sup>22</sup> In 1870 Christopher Columbus Langdell came to Harvard and announced that henceforth law was to be taught from cases, largely old English cases assembled in chronological order, and by means of class discussion. Simultaneously he uttered some generalities about law being a science, proceeded to toss out of the law course almost everything except private law, and set to the task of lengthening the curriculum to three years, while restricting admittance to college graduates. Within the span of fifty years, his method and curriculum had taken over legal education.

The standard version of this tale stresses the roles of Langdell and Ames; William Keener, who brought the revolution to Columbia; and the regulatory efforts of the ABA and the new Association of American Law Schools. Generally overlooked are the "missionaries,"<sup>23</sup> the individuals who pressed the Langdellian revolution throughout the provinces, including such men as Nathan Abbott, who helped Wigmore bring the case method to Northwestern, thereafter became dean at Stanford and finally a professor at Columbia;<sup>24</sup> or James Parker Hall, who helped Abbott at Stanford and then became the first regular dean at Chicago;<sup>25</sup> or Ernest W. Huffcutt, who started teaching at Indiana, then moved to Northwestern, and finally to Cornell where he became that school's first academic, rather than

21. Dorothy Ross, *The Development of the Social Sciences, in The Organization of Knowledge in Modern America, 1860-1920*, 104 (A. Oleson & J. Voss ed.; Baltimore, 1979).

22. My version is a caricature, of course. The most sensible rendition of this story is found in Stevens, *Law School*, *supra*, note 1, at 35-64.

23. See John Henry Wigmore to James B. Thayer, May 6, 1884, Box 18. Thayer Mss. Harvard Law Library ("I feel like a 'legal missionary'" in bringing the case method to Northwestern).

24. (1854-1941). B.A. Yale, 1877. Private practice, Massachusetts, 1881. Prof. 1891, Michigan; Prof. 1892, Northwestern; Dean 1895, Stanford; Prof. 1906, Columbia. Pres. 1904, AALS.

25. (1871-1923). A.B. 1894, Cornell; LL.B. 1897, Harvard. Private Practice, 1897, Buffalo. Assoc. Prof. 1900, Prof. 1902, Dean 1904, Chicago. Pres. 1922, AALS.

practitioner, dean;<sup>26</sup> or Harry S. Richards, who kept the Harvard tradition alive first at Iowa and then at Wisconsin;<sup>27</sup> or William Reynolds Vance, who worked harder at moving up than most men, starting at Washington and Lee and then hitting George Washington and Minnesota before sticking at Yale;<sup>28</sup> or Eugene Wambaugh, the first graduate from a major law school at both Iowa and Western Reserve.<sup>29</sup>

When these men entered law teaching there was no profession. There were effectively two kinds of law schools, one staffed largely or exclusively by practicing lawyers or judges;<sup>30</sup> the other with a very small faculty of "retired"—that is, either aged or unsuccessful—practitioners or judges, assisted by a few active practitioners.<sup>31</sup> Neither of these types of law schools died out in the next thirty years. Indeed, in a real sense they thrived. But alongside developed a third and ultimately dominant type of law school, the law school staffed largely, preferably exclusively, by such academics as Huffcutt and Richards. These academics created this niche for themselves largely through hard work and effective propaganda. Wherever they went they pushed their own distinctiveness—their distinctive way of teaching,<sup>32</sup> their distinctive conception of the subject matter to be studied,<sup>33</sup> and their

26. *Supra* note 9.

27. *Supra*, note 10.

28. *Supra*, note 11.

29. *Supra*, note 12. Wambaugh was hired at Western Reserve in 1892 but resigned before teaching there in order to accept an appointment at Harvard. See Charles Cramer, *The Law School at Case Western Reserve University* 29 (Cleveland, 1977).

30. See, e.g., Irving Browne, *The Albany Law School*, 2 Green Bag 153 (1890); Charles Norton, *The Buffalo Law School*, 1 Green Bag 421 (1889); C. Stuart Patterson, *The Law School of the University of Pennsylvania*, 1 Green Bag 99 (1889); George Swasey, *Boston University Law School*, 1 Green Bag 54 (1889).

31. See e.g., Charles Clafin Allen, *The St. Louis Law School*, 1 Green Bag 283 (1889); Chancellor Green, *The Law School of Cumberland University*, 2 Green Bag 63 (1890); Emlin McClain, *Law Department of the State University of Iowa*, 1 Green Bag 374 (1889); Charles Slack, *Hastings College of the Law*, 1 Green Bag 518 (1889). One can discern these two patterns and intuit variations by examining the courses of study in various law schools as listed in 1891 in 1 Report of the Commissioner of Education for the Year 1890-91, 414 (1894).

32. The literature between 1890 and 1915 on teaching methods is voluminous. Robert Stevens, *Law Schools and Legal Education 1879-1979: Lectures in Honor of 100 Years of the Valparaiso Law School*, 14 Val. U. L. Rev. 179, 214-15 (1980), samples some of the more obscure literature as a debate between advocates and opponents of the case method. On a substantive level, this is true, but equally important, in general the proponents of the case method are full-time academics associated with "university" law schools and the opponents are practitioners, part-time teachers, or "owners" of proprietary law schools.

33. Here the argument is generally one of theory—law as a "science" versus practice—and again the participants turn up on predictable sides. The distinctive (Socratic/case) method held dear by the academics, however, was criticized almost immediately as "undermin[ing] the scientific treatment of law for which Langdell and his associates had called." Stevens, *Law School*, *supra* note 1, at 118. See Josef Redlich, *The Common Law and the Case Method in American University Law Schools* 50 (New York, 1914). The relationship between case method and late-nineteenth-century "legal science" is at best poorly understood. For an examination of this relationship, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 Pitt. L. Rev. 1 (1983).

distinctive status in the profession.<sup>34</sup> They pushed themselves too. Quite obviously, they set to the task of converting the heathen and to stocking the missions thus established, largely through an effective old boy network.<sup>35</sup> And they were a combative lot. They would fight about anything: the elective system,<sup>36</sup> the honor system,<sup>37</sup> the use of practice courts,<sup>38</sup> participation in intercollegiate athletics<sup>39</sup> (a real problem in schools that were, as most were, primarily undergraduate),<sup>40</sup> law school fraternities,<sup>41</sup> and the diploma privilege.<sup>42</sup> They were organizers as well. They jumped into the ABA's Section on Legal Education once it was formed<sup>43</sup> and then they jumped into the AALS when it became clear that the Section would not be their distinctive preserve.<sup>44</sup> Throughout it all, they managed to produce a vaguely respectable body of scholarship to fill the pages of the law reviews they created.

While these academics were taking over and, on occasion, founding law schools, they were also busy talking about what they were doing. The earliest significant explanation came from Thayer who emphasized the importance of great works of scholarship designed to present the Harvard doctrinal universe in a scientific fashion—that is, orderly and carefully researched, especially in its historical aspects.<sup>45</sup> Five years later Ames, while pushing the importance of “full-time” law teachers at a major law school that still relied heavily on practitioner-teachers, presented a more

34. Auerbach, *supra* note 2, at 75-85.

35. See John Henry Schlegel, American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore, 29 Buff. L. Rev. 195 (1980); David McKown, The Dean: The Life of Julian C. Monnet 117-130 (Norman, 1972) suggests the existence and effectiveness of the old boy network. I infer intentionality from the pattern of provincial employment of young law teachers, examples of which are to be found in notes 3, 9-12 *supra*. Roalfe, *supra* note 3, provides some support for these notions.

36. See Ernest Huffcut, The Elective System in Law Schools, 1 Am. L. Sch. Rev. 248 (1904); Discussion, 1 Am. L. Sch. Rev. 262-63 (1904).

37. Survey, The Honor System, 2 Am. L. Sch. Rev. 400 (1910); William Draper Lewis, The Honor System of Conducting Examinations in Law Schools, 2 Am. L. Sch. Rev. 454 (1910); John Lile, The Honor System, 2 Am. L. Sch. Rev. 456 (1910); Discussion, 2 Am. L. Sch. Rev. 464-70 (1910).

38. See e.g., Gavin Craig, Moot Courts as a Part of the Law School Curriculum, 3 Am. L. Sch. Rev. (1913); William Hastings, Practice Courts, 3 Am. L. Sch. Rev. (1912); McClain, *supra* note 31, at 384.

39. See Andrew Bruce, Law School and Intercollegiate Athletics, 1 Am. L. Sch. Rev. 37 (1903).

40. *Id.* at 39-41.

41. See Nathan Abbott, Law School Fraternities, 2 Am. L. Sch. Rev. 33 (1903).

42. See Stevens, Law School, *supra* note 1, at 95, 98; Robert Henry, Admission to the Bar on Diploma, 3 Am. L. Sch. Rev. 522 (1914).

43. See Stevens, Law School *supra* note 1, at 95, 114-16.

44. Indeed, the Section “was open to any ABA member” from its formation, *Id.* at 105 n. 26. See Alfred Z. Reed, Present-Day Law Schools in the United States and Canada 23 (New York, 1928). Stevens credits the creation of the AALS by the ABA to pressure from the new breed of academic lawyer . . . for the establishment of an organization of “reputable law schools.” *Id.* at 96.

45. See James B. Thayer, The Teaching of English Law at Universities, 9 Harv. L. Rev. 169, 179-81 (1895).

ambiguous "vocation" for his brethren by emphasizing the teaching of law somewhat at the expense of scholarship.<sup>46</sup> Subsequent to Ames's attempt, presidents of the AALS and others felt obliged to help along this matter of professional definition. One suggested that working to raise the educational standards for admission to the practice of law was a sufficient role;<sup>47</sup> another that working to develop "American law into a single harmonious system" through establishing "national law schools" was enough.<sup>48</sup> A third found that "the ultimate function" of the law teacher was to work to "adapt the law . . . to the needs of society under existing industrial and sociological conditions,"<sup>49</sup> being careful to point out the "ever-present necessity of maintaining the continuity of the great current of the law that has come down to us through the centuries."<sup>50</sup>

The common academic enterprise that resulted from all this effort did not appear fully formed all at once. How long the effort took can be judged in several ways. The outside parameters are 1870 and 1921, the year of Langdell's arrival at Harvard and the year that the ABA formally recognized the academic's claim to primacy in teaching law. Within those dates there are several potential measures. An indirect one, appropriate for a capitalist economy, is the interest of the capitalists in the law school market. In the years after the Civil War, major treatises were easily published. Indeed, by 1890 there were four or five major book publishers.<sup>51</sup> Yet during these same years authors of casebooks had a more difficult time. Langdell had his first two books—on contracts and sales—published by Little, Brown, but six years later he ended up publishing his work on equity pleading himself. Although Gray and Thayer shared a publisher, the prolific Ames could not find a regular outlet for his work. Starting in the late 1880s other scholars began to publish casebooks here, there, and everywhere, sometimes with major law book publishers, sometimes with relative unknowns. Quite plainly, however, no publisher was willing to risk publishing more than a few isolated volumes. In the nineties the West Publishing Company tried to start a series of casebooks, and Little, Brown offered half a dozen volumes.

46. "Of this vocation the paramount duty is, of course, that of teaching. Having mastered his subject, the professor must consider how best he can help the student learn it also." James Barr Ames, *The Vocation of the Law Professor*, in *Lectures on Legal History and Miscellaneous Legal Essays* 354, 362 (Cambridge, 1913) (address delivered on February 21, 1901, at the dedication of the new building of the Department of Law of the University of Pennsylvania).

47. Harry Richards, *Progress in Legal Education*, in *Handbook of the Association of American Law Schools and Proceedings of the Fifteenth Annual Meeting*, 60 (1915), repr. 4 *Am. L. Sch. Rev.* 83 (1916).

48. George Kirchway, *American Law and the American Law School*, in *Proceedings of the Eighth Annual Meeting of the Association of American Law Schools*, 11, 15, 17 (1908), repr. 2 *Am. L. Sch. Rev.* 194 (1909).

49. William Vance, *The Ultimate Function of the Teacher of Law*, in *Proceeding of the Eleventh Annual Meeting of the Association of American Law Schools*, 137 (1911), repr. 3 *Am. L. Sch. Rev.* 2 (1911).

50. *Id.* at 38.

51. Support for the assertions of this paragraph, unless otherwise noted, is to be found in Lester Mazor, *Bibliography of American Casebooks* (1981) (unpublished manuscript).



Both subsequently gave up the effort. Then the Harvard Law Review Association emerged as a major casebook publisher, though with a rather narrow range of authors. The market was simply too thin; and the Harvard monopoly of Harvard authors, begun no doubt in response to commercial publisher hesitancy, made matters worse. Ten years later the market had improved sufficiently that West began publication of its American Casebook Series, "treating all the important subjects ordinarily covered in a law school curriculum."<sup>52</sup> Even then it hedged its bets by starting a Hornbook Case Series, shorter casebooks for use with West's Hornbooks in those schools that still used text and cases.<sup>53</sup> The publishers were far from sure of the law school's direction.

Another view of this hesitant growth of the profession is furnished by West's "Intercollegiate Law Journal," distributed free to "students in law schools"—*The American Law School Review*. From its beginning in 1902 the editor saw that law professors were a major market for his wares. But initially there were other markets as well, for the journal reported news of the ABA Section on Legal Education and material on legal ethics and bar admission.<sup>54</sup> Quite soon ABA affairs began to lose their prominence, and reports of the annual meeting of the AALS increased in length and comprehensiveness.<sup>55</sup> By 1908 ill-tempered criticisms of case-method instruction,<sup>56</sup> while plainly publishable, drew disclaimers from the editor and a reminder that his journal "is not published for the benefit of any particular class of law schools, nor for the advancement of any special method of legal instruction."<sup>57</sup> Within a few years, however, such criticisms had disappeared, and the journal had begun publishing transcripts of AALS meetings.<sup>58</sup> More revealing still are changes at the micro level, in the

52. The American Casebook Series, 2 Am. L. Sch. Rev. 276 (1909).

53. See e.g., Am. L. Sch. Rev. back cover (Spring 1913) (advertisement). The debate between those who would use texts and those fond of casebooks was carried into the pages of the *Review*—itself published by West. See, e.g., George Chose, A Comparison of the Use of Treatises and the Use of Case-Books in the Study of Law, 3 Am. L. Sch. Rev. 81 (1912) ("side-by-side" comparison of the issue of "Presumption of the Continuous of Life" as treated in *Greenleaf on Evidence* (and) *Thayer's Cases on Evidence*). The author of this piece, noting the comparative brevity of the textbook's treatment, declared that "a law school using treatises as the fundamental basis of instruction can cover the same field of legal knowledge in a shorter time than schools which confine themselves to casebooks." *Id.* at 82.

54. See, e.g., The Meeting of the Section of Legal Education of the American Bar Association, 1 Am. L. Sch. Rev. 150 (1904); American Bar Association Canons of Ethics, 2 Am. L. Sch. Rev. 223; Hoffman's Fifty Resolutions in Regard to Professional Deportment, 2 Am. L. Sch. Rev. 230; Teaching Legal Ethics in Law Schools, 2 Am. L. Sch. Rev. 377 (1910); A Special Request from the Committee on Standard Rules for Admission to the Bar, 2 Am. L. Sch. Rev. 191, (1908); Recent State Bar Examination Questions, 2 Am. L. Sch. Rev. 559 (1911); A. W. Richter, Reform in the Requirements for Admission to the Bar in Wisconsin, 3 Am. L. Sch. Rev. 432 (1914).

55. Indeed, from 1915 to 1922 the *Review* dedicated an entire issue to the meetings of the AALS. See e.g. Meeting of the Association of American Law Schools—1915, 4. Am. L. Sch. Rev. 65 (1916).

56. See Charles Carusi, A Criticism of the Case System, 2 Am. L. Sch. Rev. 213 (1908).

57. See Notes and Personals, 2 Am. L. Sch. Rev. 237 (1908).

58. See *supra* note 55.

*Review's* gossip column, "Notes and Personals." This column, dependent on self-reporting, contained obituaries of deans and biographies of successors, together with notices of appointments, excerpts from speeches, bits of what might pass for legal humor, and announcements of courses and enrollments. At this level the content of the column did not change, but its details show quite a shift. In 1902 deanships were routinely passed from ancient judges, learned in the law, to well-known lawyers, deeply interested in legal education.<sup>59</sup> Ten to fifteen years later the retiring dean was lucky to rate more than passing mention in an article that introduced an academic, inevitably an authority on something or other, and emphasized that the faculty now had three or four full-time teachers and had adopted modern methods of instruction.<sup>60</sup> In 1902 most announcements of faculty appointments could list little more than degrees and a period in practice, often in some places so unexpected that one wondered how the school and the individual got together.<sup>61</sup> Fifteen years later the typical announcement included an extensive list of teaching credits.<sup>62</sup> The pattern of these credits even reveal a nascent pecking order among law schools—Montana and North Dakota were the pits; Kansas and Missouri, a step up; then Illinois, Wisconsin, and Minnesota, with Iowa and perhaps Nebraska after Pound, a half-step in between; and finally the big time, Chicago, Michigan, Columbia, and Harvard.

During these same twenty-five or thirty years, similar patterns of activity were evident in other parts of the university, notably in the emergence of a whole new cluster of scholarly disciplines—the social sciences as we know them. These new disciplines followed parallel patterns of development. Hours in public meetings and pages in the journals were devoted to delimiting each discipline's field of inquiry, methods of teaching and of research.<sup>63</sup> From time to time, leaders, actual or hopeful, suggested various "missions" that the group could undertake or had undertaken.

The parallel between the activities of the lawyers and the social scientists is striking. During the last years of the nineteenth century each group created a professional discipline. To identify this broad phenomenon is not, however, to explain it. When it comes to explanation Magali Larson's analysis of professionalization fits the data very well.<sup>64</sup> She argues that

59. See e.g., Law School Personals, 1 Am. L. Sch. Rev. 24 (1902).

60. See e.g., Notes and Personals, 3 Am. L. Sch. Rev. 582 (1914).

61. See e.g., Law School Personals, 1 Am. L. Sch. Rev. 24 (1902).

62. See e.g., Notes and Personals, 3 Am. L. Sch. Rev. 582 (1914).

63. *Supra* note 21.

64. Magali Larson, *The Rise of Professionalism* (Berkeley, 1977). A colleague, among others, has criticized the argument that follows for its failure to isolate any social "push" for such a development. The source of the push however seems relatively obvious. As Andrew Barlow has shown is the case for Harvard, professionalization is a plausible response on the part of an upper class that feels it is losing its previously informal control over social relations, that is, undergoing an informal "crisis of authority." See A. Barlow, *Coordination and Control: The Rise of Harvard University* (unpublished Ph.D. thesis 1979). At the same time a further push comes from a middle class that by the 1880s or 1890s was wealthy enough

professionalization is an attempt by a part of the middle class to improve its social and economic position through a strategy of market control. In order to make this strategy work each group of individuals has to create an identifiable product in a recognizable market. Because the product is an intangible, the traditional tasks of product standardization and differentiation—so important to toothpaste, detergent, or margarine manufacturers—are especially difficult. Standardizing and identifying the product must be accomplished indirectly by gaining control over the providers of service. This control is acquired in two ways: through state sanctioned exclusion of potential competitors and through control of the production of producers. Together, these methods perform the usual function of limiting supply in order to raise price. At the same time, in the proper setting, in the modern university, exclusion of others and control of production permits another kind of control—that over the production of knowledge in the profession. Obtaining control over the production of knowledge is important to a professional group because by doing so the group can supplement state established exclusions of potential competitors. Standardization of knowledge also aids product differentiation, for members of the group thus come to share a common cognitive base, a distinctive kind of knowledge leading to an exclusive possession of tools and techniques of the defined trade. In short, to establish a modern profession one needs state sanction for exclusive possession of distinct knowledge based on university production of certified professionals. The key social institutions for professional advance are the state and the university. These two institutions are only necessary, they are not sufficient. To them must be added the standardized, differentiated product—the cognitively delimited and unified field of knowledge possessed by all members of the profession.

Larson's analysis illuminates the Langdellian revolution. The academic lawyers who established the twentieth-century law school faced problems similar to those confronted by other nascent professionals: creation of an identifiable product, exclusion of others from the market for that product, and justification of the resulting market control. These problems are most easily taken up in reverse order.

Academic lawyers attempted to justify their claim to a privileged market position in three ways. First, they sought to define a role, vocation, or

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and numerous enough to be able to invest marginal dollars in education as a mark of class distinction. Similarly, the failure of the English legal profession to bring forth an academic wing as it became a modern profession is easily explained by the differing social context in the two countries. In America by 1880 academic law training had become recognized as a way of supplementing an apprenticeship. William Johnson, *Schooled Lawyers* (New York, 1978). No such development had taken place in England, indeed the reverse had occurred. Lacking the necessary social institutions English development took a different course, one that built on the available form—the practitioner's treatise.

A far more significant problem for the argument would be the apparent failure of any of the developing social science professions to seek state sanction for its exclusionist program. Here the subsequent history of psychology and the recent calls for the licensing of public-opinion pollsters suggests that one may need a certain minimum number of nonacademic practitioners before state sanction becomes a serious problem. With less than that number less formal social control is adequate.

mission for themselves which was of "service" to society: improving the law, elevating standards of the profession, advancing knowledge. More important than the content of the role is that the role was always yoked to a program of product standardization and competition exclusion by means of higher standards. A second justification, aimed more directly at the profession, worked at the intraprofessional distinction between teachers and practitioners. Here the dominant note was of division of labor between equals, advanced, of course, by the less equal party. This justification of the academic's market position stressed the difficult work of systematic scholarship and teaching, recurring themes from Thayer and Ames. The third and last justification is less obvious, but no less crucial. It is no accident that these law teachers saw and presented themselves as *university* law professors, for it was their connection with the university that provided a separable justification for the privilege they sought. The university with its panoply of middle-class attributes—rank, order, meritocratic advancement through graded work, the creation of knowledge for use—was a powerful symbol and an increasingly powerful institution around the turn of the century. Law professors stuck to it like glue. Thayer emphasized the university connection as did everyone thereafter, at times only to lament its absence. One finds great concern among these law professors with all the trappings of the academy—the nomenclature of degrees,<sup>65</sup> the necessity for examinations,<sup>66</sup> the honor system (said to be impracticable unless the student body be "drawn from those classes in the community which understand each other's conditions and points of view"),<sup>67</sup> and scholarship in the German historical mode.<sup>68</sup> So much for justification.

The matter of market exclusion is the aspect of this equation that has heretofore been more emphasized. By their campaign for higher standards, law professors assisted the bar's attempt to keep lower-class and immigrant populations from entering practice.<sup>69</sup> But in so doing these men<sup>70</sup> were not simply swinging with the ABA nativist moguls. In seeking state sanction for exclusionist admissions policies they were seeking to establish their monopoly of law teaching, for by definition the full-time, day law school, enrolling only college graduates would be the preserve of the academic law professors. State support for the one was tantamount to state support for the other, especially since the call for higher standards for lawyers and thus

65. See e.g., Nathan Abbott, Address, 1 Am. L. Sch. Rev. 323, 325 (1905).

66. See e.g., John C. Townes, Organization and Operation of a Law School, 2 Am. L. Sch. Rev. 440, 445-47 (1909).

67. William Draper Lewis, The Honor System of Conducting Examinations in Law Schools, 2 Am. L. Sch. Rev. 4543, 455 (1910). The *Review* was in fact a forum for the debate; *supra* note 37.

68. See generally Jurgen Herbst, German Historical School in American Scholarship (Cambridge, 1965).

69. See Auerbach, *supra* note 2, at 95-129; Stevens, Law School, *supra* note 1, at 99-103.

70. There were, as best as can be seen, no women except for the venerable Ellen S. Mussey of the Woman's Law Class, later the Washington College of Law. See Stevens, Law School, *supra* note 1, at 82-84.

students was far easier to justify than a call for higher standards for law professors, particularly when teaching practitioners were around. At the same time, state support for physical exclusion was only part of the task. Intellectual poachers had to be excluded from the law professor's territory too. This job, however, carries over into the territory of product definition and standardization. The two are best considered together.

Great effort went into developing the law school's equivalent of the Model T. Enormous amounts of thought and pages of print were devoted to such matters as standardization of credits,<sup>71</sup> standardization of degrees,<sup>72</sup> and standardization of examinations.<sup>73</sup> The entire discussion about prelegal education was in fact a question of product standardization.<sup>74</sup> But the standardized unit of output is possible only if the head of the standardized law student is filled with a standardized but unique unit of knowledge. And here we must return to that most improbable of accidents—Christopher Columbus Langdell.<sup>75</sup>

The bearded prophet of Austin Hall was mad, as Holmes said in print<sup>76</sup> and as Gray did in private.<sup>77</sup> His ideas about law were ultimately incoherent. The suggestion that law was a science—a body of systematic principles resting on evidence—made perfect mid-nineteenth century sense (indeed law had been a science for Blackstone, too). His accompanying observation, however, that the data for this science were to be a small fraction of the reported cases, mostly old English ones, studied inductively in a library, suggests that Langdell really did not understand the difference between Blackstone's science, Newton's science, Lyell's science, and Darwin's science. His curricular emphasis on litigation was, by 1890,

71. See, e.g., Martin P. Burks, *Law School Credits*, 2 *Am. L. Sch. Rev.* 174 (1908).

72. See, e.g., Abbott, *supra* note 65.

73. See, e.g., *Final Examinations Questions in Prominent Law Schools*, 3 *Am. L. Sch. Rev.* 640 (1915); John Grant, *The Single Standard in Grading*, 29 *Colum. L. Rev.* 920 (1929), repr. 6 *Am. L. Sch. Rev.* 781 (1930); Lawriz Vold, *Impersonal Law Examinations*, 6 *Am. L. Sch. Rev.* 214 (1923).

74. See, e.g., Arthur Hadley, *Is the B.A. Degree Essential for Professional Study*, 1 *Am. L. Sch. Rev.* 379 (1906). Although certain to raise the level of students' abilities and qualifications, such a requirement was also "an introduction of a sort of caste system in the worst form." *Id.* at 380.

75. For a different view of the significance of Langdell than the one that follows see Anthony Chase, *The Birth of the Modern Law School*, 23 *Am. J. Legal Hist.*, 329 (1979); Anthony Chase, *Origins of Modern Professional Education: The Harvard Case Method Conceived as Clinical Instruction in Law*, 5 *Nova L. J.* 326 (1981).

76. See Book Notice, 14 *Am. L. Rev.* 233 (1880) (unsigned review of Christopher Langdell, *Selection of Cases on the Law of Contracts*, Boston, 1879). In the review, Holmes refers to Langdell as "the greatest living legal theologian" with some veiled distaste; seeing Langdell as divorced from reality, he remarks that "we might call him a Hegelian in disguise, so entirely is he interested in the formal connection of things, in logic, as distinguished from the feelings which make the content of logic, and which have actually shaped the substance of the law." *Id.* at 234. For a good history of the interaction of Holmes's and Langdell's philosophies, see Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Proving Years 1855-59* (Cambridge, 1963).

77. See Letter from John C. Gray to Charles W. Eliot, Jan. 8, 1883 (Harvard Archives), repr. in Howe, *supra* note 76, at 158 ("Langdell's intellectual arrogance and contempt is astounding . . . a school where the majority of the professors shuns and despises the contact with actual facts, has got the seeds of ruin in it and will and ought to go to the devil.")

hopelessly unrepresentative of the work of the practicing bar he served, and his Socratic method offered nothing distinctive in thought. Indeed, his dialogue was something of a throwback to old catechistic recitations of the New England college and ignored that important educational “innovation” from Germany—the lecture.<sup>78</sup> Ultimately, the soundness of Langdell’s ideas about science, content of curriculum, and teaching method mattered little, however. What he offered the law schools was an intellectual Model T, a wholly complete, conceptually unified universe to put in the mind of the standard student.

Much ink has been used over Langdell’s “system,” relatively little, over his curriculum. But the choice to cast public law out of the lawyer’s world and to justify private law doctrine internally, as a matter of logic, not as a matter of ends, may have been a stroke of genius. The resulting curriculum of “pure law” was utterly without competing claimants in the late nineteenth century. Stripped of the political and economic theory, once part of the study of law, and thus intellectually impoverished, Langdell’s curriculum allowed its champions to avoid such messes as Theodore Dwight’s fight with Burgess’s School of Political Science at Columbia over the place of public law.<sup>79</sup> All that was left was for Ames to suggest that thinking like a lawyer was a teachable method<sup>80</sup> and the job was done.

Of course, not just any hermetically sealed intellectual universe would have done. It is surely important that Langdell’s world was not debilitating to the needs of elite practitioners. Instead, it was familiar to them and may even have created an employee who, through his research skills, could actually earn his keep while learning to practice, just as the old copyist apprentices did. Nor did it hurt that his notion of historical development was, if not inherently, at least easily, a conservative brake on doctrine and his emphasis on appellate cases support for judicial, and thus relatively elite, control of the law-making machinery. And his internal, logical justification of existing rules put to one side questions of the instrumental character of those rules, just as the fathers of his students would have wished. But despite these matters, it still would be hard to find yourself at a better place at a better time than did C. C. Langdell.

The importance of conceptual unification of law for the nascent professionalization of academic lawyers can, of course, be overemphasized. While it can, in part, explain the success of Langdell’s method over that of John Norton Pomeroy’s equally grand scheme put into practice at Hastings in 1878,<sup>81</sup> it deals less successfully with the demise of Dwight’s comprehensive method at Columbia.<sup>82</sup> Nonetheless, many otherwise

78. See, Lawrence Veysey, *The Emergence of the American University* 37-38 (Chicago, 1965).

79. Columbia Univ. Found. for Research in Legal History, *A History of the School of Law*, Columbia University 85-89 (New York, 1955) [hereinafter cited as *Columbia*].

80. Stevens, *Law School* *supra* note 1, at 41, 56.

81. See Thomas Garden Barnes, *Hastings College of the Law: The First Century* 88-118 (San Francisco, 1978).

82. *Columbia*, *supra* note 79, at 119-32. See Joseph Beale, *A Treatise on the Conflict of Laws* 1-50, 2d ed. (Boston, 1935).

curious events become more comprehensible if the social role of the law professor's conceptual universe is remembered.

For example, all the palaver about the necessity for uniform law even at the cost of losing control of law making to the legislature,<sup>83</sup> the attempts to portray *the* system of *the* law as a coherent whole in casebook after casebook, the several tries in the 1910s to shore up that notion culminating in the Restatement project,<sup>84</sup> and even Hohfeld's analytic craziness<sup>85</sup> make better sense when understood as having both potential political and intellectual significance. By struggling to keep the doctrinal universe pure, the pre-World War I law professors worked not only to push along the academic peanut but to secure their special place in the division of labor. This is reflected in the line that separated friendly criticism by insiders from threatening ideas.

When Albert Kales, a fine future interests scholar from Northwestern, suggested that the next logical development of the casebook was to create casebooks for scientifically teaching the particular law of a single state, everyone looked up.<sup>86</sup> Law professors from state law schools, sensing an attack on the eastern establishment, offered praise;<sup>87</sup> but that establishment, less than amused, brought out the big guns. First came William Draper Lewis, dean at Pennsylvania, who thought the idea disposed of with the observation that "the average law school teacher, or at least, the teacher in the best schools, knows something beyond the casebook" and then lamented how narrowing it would be not to know the opinions of Lord Eldon.<sup>88</sup> When that did not end the dispute, George W. Kircheway, dean of Columbia, ranged all over the field—from the impetus for local law reform coming from exposure to the law of other jurisdictions, to the lack of time to

83. See, e.g., William Schofield, *Uniformity of Law in the Several States as an American Ideal*, 21 Harv. L. Rev. 510, 519-26 (1908).

84. See, e.g., Joseph Beale, *The Necessity for the Study of Legal System*, Proceedings of the Fourteenth Annual Meeting of the Association of American Law Schools 31, 42-43 (1914); Alexander, *Memorandum in re Corpus Juris*, 22 Green Bay 59 (1910). Schlegel, *supra* note 35, at 195, 234, n. 241.

There is a deep connection between the American Law Institute project and the professionalization of law teachers. Money for the restatements was secured from the Carnegie Foundation through the intervention of Elihu Root. Root was asked to approach the foundation by William Draper Lewis, dean at Pennsylvania, and general AALS Poobah. The two men met when they both served on the ABA Committee on Legal Education which forged the compromise that finally legitimated the position of the academic law professor by suggesting that apprenticeship was no longer an acceptable route to the bar but that a degree from a part-time night school was, so long as that the school required four, not three years to complete its degree. See Philip C. Jessup, *Elihu Root* (Hamden, 1938); Stevens *supra* note 1, at 115.

85. Hohfeld, *supra* note 8.

86. Albert Kales, *The Next Step in the Evolution of the Casebook*, in Proceedings of the Seventh Annual Meeting of the Association of American Law Schools 82, repr. in 21 Harv. L. Rev. 92 (1907); Albert Kales, *A Further Word on the Next Step in the Evolution of the Casebook*, 4 Ill. L. Rev. 11 (1909).

87. See, e.g., John Lawson, *Discussion in Proceedings of the Seventh Annual Meeting of the Association of American Law Schools*, 5 repr. 2 Am. L. Sch. Rev. 116 (1907).

88. William Draper Lewis, *Discussion in Proceedings of the Seventh Annual Meeting of the Association of American Law Schools*, 3, repr. 2 Am. L. Sch. Rev. 116 (1907).

do everything, to a patriotic appeal for “an American law.”<sup>89</sup> Finally came Dean Ames’s turn to chastize one of his own strayed sheep:

The writer of the paper and I seem to differ radically as to the object of the three years at the law school. I should infer from the paper that to the author the main object is knowledge. The object arrived at by us at Cambridge is the power of legal reasoning, and we think we can best get that by putting before the students the best models to be found in the history of English and American law, because we believe that men who are trained by examining the opinions of the greatest judges that the English Common Law System has produced are in a better position to know what legal reasoning is and are more likely to possess the power of solving legal problems than they would be by taking up the study of the law of any particular state.<sup>90</sup>

Ames chose to ignore Langdell’s science, law reform, and even his own scholarship, as he struck a note more reminiscent of a nineteenth century justification of the study of Greek and Latin as “mental discipline” than of the modern university. Conceptual unity was important indeed.

89. George Kirchway, Discussion in Proceedings of the Seventh Annual Meeting of the Association of American Law Schools 8, repr. 2 Am. L. Sch. Rev. 117 (1907). See also Kirchway, *supra* note 48.

90. James Barr Ames, Discussion in Proceedings of the Seventh Annual Meeting of the Association of American Law Schools 16, repr. 2 Am. L. Sch. Rev. 119 (1907).